



Response to Queensland Office of Industrial Relations' Regulation of the Labour Hire Industry 2016 Issues Paper

National Union of Workers

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Introduction

The National Union of Workers (**NUW**) is a large Australian labour union registered under the *Fair Work (Registered Organisation) Act 2009* (Cth).

It represents workers in all forms of employment in a range of industries including warehousing, cold storage, logistics, pharmaceutical, oil refining and storage, food processing and the fresh food supply chain, food services, manufacturing, poultry, defence logistics, dairy, and market research.

It is the view of the NUW that the growth and entrenchment of precarious and contingent work is a significant threat to workers and their life chances. The current scheme of workplace laws in this country does not comprehend the radically changed nature of modern employment relationships.

The layers of contractual obfuscation arising from many labour hire and sub-contracting arrangements can often, in the NUW's experience, lead to exploitative practices such as wage theft, extreme working hours and forced job insecurity, for which the principal or host employer can avoid legal and moral responsibility.

The result of this is the loss of decent work and growing inequality. We therefore welcome the Queensland Government's initial Inquiry and the opportunity to provide additional submissions on options to better regulate the labour hire industry to protect workers and create an even playing field for labour hire operators in the industry.

While the Commonwealth has primary responsibility to reform Australia's workplaces to provide for more secure employment for Australian workers, the Queensland Government does have a role to play in improving workers' lives.

The Queensland Government can implement changes to the system that are proposed in this submission, and also play a role to actively advocate for changes to existing Federal laws.

Response to Chapter Four – Options to better regulate the labour hire industry

Question:

1. What do you think are the important features of a system to effectively regulate the labour hire industry in Queensland?

The NUW believes that improving standards in the labour hire industry can only be achieved through a strong licensing scheme that incorporates:

- Payment of a bond and annual license fee to the QLD government;
- A threshold capital requirement to operate a labour hire company;
- Fundamental requirements for license holders and related parties;
- A dedicated licensing body and compliance unit for monitoring and enforcing the rules of the license; and
- Mandatory workplace rights and entitlements training

This model would oblige a company supplying labour to another party to be registered and ensure that labour hire companies which operate in Queensland are capitalised, reputable, 'fit and proper', adhere to certain minimum standards and can be monitored.

The intention of the model is to encompass labour hire agencies, triangular contracting arrangements and other contracting mechanisms where host companies are supplied with labour by third parties.

It would also ensure that workers employed by labour hire companies are remunerated lawfully and treated with more respect and dignity than is often now the case.

Compliance with workplace laws

The holding of a license must be subject to ongoing compliance with State and Federal workplace laws, including provisions of the *Fair Work Act 2009* (Cth) and applicable modern awards or enterprise agreements and the *Work Health and Safety Act 2011* (QLD).

Failing to ensure employees receive their legal entitlements is currently a regular occurrence in this industry. Such failures are often intentional. Any licensing scheme must work to eliminate this industry trait.

As such, an effective labour hire licensing scheme must include a licensing body with a dedicated compliance unit.

The unit would be funded by the license fees and the interest received from bonds paid by operators and could be set up within an appropriate existing structure or on a stand-alone basis.

Responsibilities of the Compliance Unit.

The licensing body and compliance unit would be responsible for issuing licenses, ensuring compliance with license requirements and monitoring the activities of licensees through regular audits and investigations.

The unit would also:

- Establish a public register of all licensed labour hire companies to ensure transparency and assist with compliance;
- Develop and manage an online portal that acts as a 'one-stop-shop' for workers, labour hire operators and host businesses;
- Provide the Queensland Government with a strong understanding of the companies operating in the labour hire industry in Queensland;
- Conduct investigations, including by exercising powers of entry and inspection, into allegations of noncompliance with license requirements and share information with the Fair Work Ombudsman and the Fair Work Commission to ensure minimum standards and workplace laws are complied with;
- Determine whether a license holder has, in fact, breached a condition of the license;
- Provide education and conduct targeted campaigns; and
- Audit contracts between labour hire companies and host employers.

Compliance with license requirements

Any breach of a license requirement should result in the potential revocation or suspension of a license. Where one or more of the license holders has breached the conditions of the license, the compliance unit should have the power to cancel the license.

Penalties should apply in relation to other breaches or actions, including:

- Engaging as a labour hire provider a company which is not a licensed labour hire company;
- Intentionally structuring an employment relationship to avoid the obligation for a labour hire provider to be licensed;
- Failure by a licensed labour hire company to comply with workplace laws;
- Employing persons who are in financial or decision making roles in relation to the activities of the license and are not fit and proper persons or have not obtained the relevant license;
- Providing false or misleading information to the compliance unit or failure to provide information required by the compliance unit;
- Failure to provide the required workplace rights and entitlements training (training is outlined further in 'Question 7'); and
- Any other breach of license requirements or a condition of the license.

To acknowledge the seriousness of breaches, substantial civil and criminal penalties should apply in appropriate cases. Breaches should be punishable by significant maximum penalties for license holders (including individuals), including imprisonment in the case of intentional or reckless breaches.

In the case of non-compliance with workplace laws, liability should also be imposed on companies which have engaged the services of a licensed labour hire company that has breached workplace laws in circumstances where the company engaging the provider knew or ought to have known about the breach.

In addition, the NUW believes there should be a requirement on a host company to make reasonable enquiries of a labour hire provider prior to engaging its services that it complies with its labour hire licensing obligations (this is explored further in the response to 'Question 9').

There should also be the ability for affected third parties (eg. including trade unions or affected individuals) to commence prosecutions in relation to alleged offences.

In the event that:

- a proposed license holder;
- current license holder;
- worker covered by the scope of the license; or
- a recognised third party

wishes to dispute a determination of the compliance unit, it is proposed that this dispute be heard and determined by a 'labour hire industry panel' member of the Queensland Industrial Relations Commission.

We also propose that the compliance unit would have educative, advisory and campaigning functions (this is explored further in the response to 'Question 7'). These functions must be complimentary to the key compliance functions as systems that rely solely on providing education and advice, such as the system that was set up in Japan, have proved insufficient to protect workers.¹

Finally, the licensing body and compliance unit would prepare and table reports of their licensing and compliance activities in Parliament to provide the Queensland Government with a strong understanding of the companies operating in the labour hire industry in Queensland.

Question:

2. Fit and Proper person test - what criteria do you consider appropriate to include in a fit and proper person test or otherwise to obtain a license to operate as a labour hire provider?

The granting and maintenance of a license must be subject to a 'fit and proper person' test. Such a test reflects the level of labour hire operators' responsibility over workers' wellbeing and is consistent with community expectations.

The licensing body should be responsible for considering all licensing applications.

In considering whether to approve or deny the license, the licensing body should consider:

- Whether the applicant Company meets the 'threshold capital requirement';

¹ Elsa Underhill, *A review of licensing arrangements for labour hire firms*, Deakin Graduate School of Business, December 2013. p.11.

- The identities of persons who are, or would have, any financial or operational decision making powers in relation to the activities undertaken in exercise of the license;
- Whether the persons who are, or would have, any financial or operational decision making powers in relation to the activities undertaken in exercise of the license are a 'fit and proper person'; and
- Demonstrated ongoing compliance with Fair Work Legislation and associated employment conditions (including Workcover, Health and Safety, Anti-discrimination legislation etc), time and pay records and providing pay advice;
- Any other relevant matters.

The 'fit and proper person' test for the purpose of obtaining a license should be based on the requirements of obtaining a right of entry permit under the *Fair Work Act*.

However, this test should be extended to reflect the nature of running a labour hire company in which the business operators have control over workers' wellbeing. As such, key features of the ASIC Fit and Proper Person should be incorporated into the test.² The test would consider the following -

Whether the person has been:

- convicted of an offence against an industrial law;
- convicted of an offence involving entry onto premises, fraud, dishonesty;
- violence against another person or intentional damage or destruction of property;
- ordered to pay a penalty under the Act or other industrial law in relation to action taken by the proposed license holder;
- whether the proposed license holder has received appropriate training;
- whether a license issued to the proposed license holder has been

² See ASIC Fit and Proper Person test for a credit license: <http://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-204-applying-for-and-varying-a-credit-licence/fit-and-proper-people/>).

cancelled, suspended or made subject to conditions;

- whether the proposed license holder has been disqualified from exercising or applying for a license;
- whether the proposed license holder has the attributes of good character, diligence integrity and judgement;
- either has no conflict of interest in performing their role in the labour hire business, or any conflict that exists will not create a material risk that the person will fail to properly perform their role in the labour hire business;
- whether the proposed license holder has been, or is bankrupt;³
- any other matters that the licensing body considers relevant.

In considering any other matters, the licensing body should have regard to the conditions laid out in the issues paper:

- demonstrated ongoing compliance with Fair Work Legislation and associated employment conditions, time and pay records and providing pay advice;
- WorkCover Insurance obligations;
- Workplace health and safety legislation;
- Anti-discrimination and Immigration legislation;
- Accommodation standards;
- Taxation and Superannuation Guarantee legislation;
- *Criminal Code Act 1889*.

³ ASIC also requires bankruptcy documentation for all “fit and proper people”
<http://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-204-applying-for-and-varying-a-credit-licence/bankruptcy-reports-of-fit-and-proper-people/>

As well as whether the proposed license holder has:

- Carelessly or recklessly breached an industrial law; and
- Whether there are any inherent vulnerabilities of the industry that the proposed license holder seeks to operate in.

Question:

3. What level of fee do you consider appropriate to licence a labour hire operator and how would it be collected?

We consider that a fee is an essential part of an effective licensing scheme.

An annual licensing fee ensures that the business has the appropriate amount of capital to operate a labour hire company and, in conjunction with the bond, would operate as a disincentive to very small, undercapitalised or unscrupulous employers and would likely limit the number of operators in the industry, which is currently unsustainably high.

The payment would also fund the licensing body and the activities of the compliance unit.

We believe the licensing fee should primarily be based on the size of the operator, with particular reference to the number of employees on the labour hire company's books. Given that labour hire companies generally only engage casual workers, any assessment must be on headcount and not full time equivalent employees.

The fee should be payable annually and generally all fees are increased annually in line with the Consumer Price Index (CPI).

We propose that the fee should operate on a tiered system, so that it is appropriately geared to the size of the business.

For example:

Employees	Fee
0 – 50 employees	Lower fee
51 - 199	Moderate fee
200+	Higher fee

Number of employees to be averaged over 3 months.

Given that it costs less to regulate a compliant business than a non-compliant one, the annual fee should have a performance component. In the Singaporean model annual security deposit amounts are revised depending on the 'employment agencies' placement volume and 'demerit points' for non-compliance.⁴

Of the examples provided by the Queensland Government of Business License Arrangement in Queensland in the *'Regulation of the Labour Hire Industry 2016: Issues Paper'*, the annual brothel licensing fee under the *Prostitution Act 1999* would appear the most analogous to fee price setting for labour hire companies.

The NUW recognises that the ultimate setting of the value of the licensing fee should occur only after consultation with key stakeholders, including employers and their organisations, unions and other parties with an interest in the operation of the licensing scheme.

Question:

4. What do you consider to be an appropriate amount for the threshold capital requirement and how should it be calculated?

A threshold capital requirement—based on an assessment of assets, revenue and cash flow—would need to be satisfied in order to obtain a license to operate.

This would act as an effective barrier to entry and would exclude small, undercapitalised companies from entering the market unless they have sufficient capital to properly fund the necessary costs of operation, including ongoing licence fees, tax liabilities and employee wages and entitlements, including superannuation payments.

The imposition of this requirement (along with payment of bond and license fees, mentioned above) would acknowledge the significant problem of phoenixing in the labour hire industry and is designed to eliminate this practice in the industry.

⁴ Ministry of Manpower, <http://www.mom.gov.sg/employment-agencies/eligibility-and-requirements/security-bond-requirements>

Question:

5. How should a bond for a labour hire operator to operate in Queensland be calculated and what would be an appropriate amount for the bond?

In addition to license applicants demonstrating that they have sufficient capital, it is proposed that they be required to pay a bond.

The payment of a security bond is to be held against liabilities and mitigate risk against liquidation. As such, we propose that it should be a substantial fee.

The bond acts as 'payroll insurance' and secures employees against unpaid wages and other outstanding entitlements in the event of liquidation.⁵

The NUW recognises that the ultimate setting of the value of the mandatory bond payment, initial capital threshold and on-going capital requirements should occur only after consultation with key stakeholders, including employers and their organisations, unions and other parties with an interest in the operation of the licensing scheme.

As above, we look to the Singapore model in relation to the formula for which security bonds are calculated, which takes into consideration previous performance/breaches by the agency.⁶

The formula used in Luxemborg is also notable. In the first year of activity, the agency is required to provide a 'financial guarantee' of 87,000 euros. For the following years of activity, the guarantee has been fixed at 11% of turnover.⁷

In Norway, it is a requirement of the license to register as either a limited liability/public liability company or provide a guarantee for funds/equity capital comparable to the minimum share capital given in Norwegian legislation.⁸ Temporary work agencies must also be registered with the Norwegian Labour Inspection Authority.⁹

⁵ In a national labour hire licensing scheme, this would work alongside the Fair Entitlements Guarantee (FEGS).

⁶ See Singaporean model here: <http://www.mom.gov.sg/employment-agencies/eligibility-and-requirements/security-bond-requirements>

⁷ See: <http://www.eurofound.europa.eu/observatories/eurwork/comparative-information/national-contributions/luxembourg/luxembourg-temporary-agency-work-and-collective-bargaining-in-the-eu>

⁸ See: <http://www.eurofound.europa.eu/observatories/eurwork/comparative-information/national-contributions/norway/norway-temporary-agency-work-and-collective-bargaining-in-the-eu>

⁹ Norwegian Labour Inspection Authority, <http://www.arbeidstilsynet.no/fakta.html?tid=240338>

Question:

6. What types of information do you think would be appropriate to be reported regularly by labour hire providers to demonstrate their compliance with their obligations?

To ensure transparency and activate community trust in the system, labour hire companies should be required to provide quarterly reports on:

- Compliance with workplace laws including: industrial laws, health and safety laws, anti-discrimination laws etc;
- The number of employees engaged by them;
- the number of employees from non-English speaking backgrounds;
- the number of employees engaged through work visa arrangements;
- Where employees are placed (host employer);
- Information regarding payments to Superannuation funds;
- Information of payment of Workcover premiums, including industry breakdown;
- Relevant industrial instruments that govern employee entitlements engaged by the labour hire operator, i.e. provide copies of any contracts, enterprise agreements (including those of the host employer if they include “site rates”), awards or piece rate agreements that they pay under;
- Training records, including workplace rights training;
- ATO documents; and
- Number of incidents and injuries sustained, and workers’ return to work progress.

It is proposed that copies of these reports be available for public inspection on the ‘online portal’. Should reporting information change, the onus should be on a labour hire operator to update information with 21 days of any changes, such as a new industrial instrument, or change in management.

Question:

7. What additional information and training do you think labour hire firms should receive on their rights, entitlements and obligations and how should this be delivered?

The licensing body should have an educative function. The practical implementation of this could include producing and providing information about rights, entitlements and obligations to labour hire employees and companies.

All materials about rights and obligations should be produced in a broad variety of languages.

The licensing body and/or compliance unit should provide mandatory workplace rights training to the labour hire company.¹⁰ In order to make this training cost neutral, the cost of this training can be covered in the licensing fee.

We propose that the training be mandatory and failure to undertake or complete the training be subject to a civil penalty.

Labour hire companies should also be required to provide workplace rights training to employees. They must, at a minimum, provide information to employees about the relevant industrial instrument/s, WHS laws, Workers Compensation and the relevant union/s for their occupation/industry.

As a number of recent high profile examples have demonstrated, worker exploitation is most prevalent in workplaces or amongst labour hire providers with little or no union presence and in circumstances where employees are uninformed about their minimum entitlements and workplace rights.

Basic rights education and training would help ensure workers are informed about their rights and entitlements and are able to take appropriate action to enforce them.

¹⁰ To gain a comprehensive license under Singaporean regulations 'key appointment holders' must undertake the Certificate of Employment Intermediaries (CEI). This is a course aimed at ensuring labour hire personnel understand their obligations under the law and are able to advise their clients of their rights and responsibilities. These course cover key legislation such as the Employment Act, Employment of Foreign Manpower Act (EFMA), and Companies Act. The length of the certification course/s vary depending on the type of license, ranging from 24 hrs to 40hrs and participants must pass a test to have the certificate conferred, see: <http://www.mom.gov.sg/employment-agencies/eligibility-and-requirements/eligibility-for-ea-personnel>,

The workplace rights and entitlements training must ensure the worker:

- Receives information about the minimum wages and conditions that apply to the worker, including superannuation entitlements;
- Has an understanding of the relevant workplace health and safety laws and discrimination and harassment laws (including sexual harassment) and any company policies in relation to these matters;
- Receives information about the role of the compliance unit and the Fair Work Ombudsman;
- Has an understanding of laws that relate to freedom of association and collective bargaining and including the general protections provisions of the *Fair Work Act 2009* (Cth); and
- Is introduced to a representative of a trade union as part of the training.

Upon completion of the training, labour hire companies would be required to provide the compliance unit with a statutory declaration confirming that workers have received the mandatory workplace rights and entitlements training.

Question:

8. *What information do you consider appropriate to be included in labour hire contracts to ensure that workplace regulations are met?*

All contracts should reflect the minimum employment standards for the type of work, i.e. Award and safety minimums. Contracts should include clause/s that entitle the engaged employee to pursue the principle employer in the event that the labour hire company fails to meet their obligations, or does not provide entitlements.

The compliance team should audit these contracts and issue improvement notices for those that are not compliant.

Ideally, all contracts between labour hire companies and host employers should, at a minimum, contain details of the information required to be filed by labour hire companies in compliance with the terms of their license, including:

- The number of employees engaged by them/or being placed at the host employers;
- the number of employees from non-English speaking backgrounds;

- the number of employees engaged through work visa arrangements;
- Clauses regarding payments to Superannuation funds;
- Clauses confirming payment of Workcover premiums, including industry breakdown;
- Details of industrial instruments that govern employee entitlements engaged by the labour hire operator, i.e. provide copies of any contracts, enterprise agreements (including a clause about whether they pay “site rates”), awards or piece rate agreements that they pay under;
- Training clauses, including workplace rights training;
- Clauses and policies around incidents and injuries, and workers’ return to work programs. Contracts should confirm that the labour hire company and the host employer have the same workplace health and safety policies.

All contracts should include a clause stating that employees engaged by the labour hire company have a right to freedom of association.

In contracts of a significant size, the Government should consider whether the host employer must contribute a proportion of the bond as security.

9. *Do you think there are circumstances where a labour hire worker should be able to pursue the host employer for their entitlements in the event that the labour hire provider does not meet their obligations?*

It is essential that regulation provides an obligation on host companies and those at the top of the supply chain.

Professor David Whyte from the University of Liverpool, in his submissions to the *Victorian Inquiry into Insecure Work* recognizes that much of the responsibility for contractual conditions in Australia is passed down the labour supply line¹¹ and astutely observes that “any system of labour hire regulation will therefore need to ensure accountability is placed not merely at the bottom end of the supply chain” but also consider incorporating a reporting mechanism obliging the principal/host companies to “demonstrate awareness of the origins of produce, and of labour conditions in firms they contract, and to use this

¹¹ Submissions of Professor Peter Whyte to the Victorian Labour Hire Inquiry, University of Liverpool, p.3

mechanism to trigger liability when they knowingly allow regulations to be breached.”¹²

If the host employer has:

- Engaged a labour hire provider which is not a licensed labour hire company; or
- Intentionally structured an employment relationship to avoid the obligation for a labour hire provider to be licensed; or
- has carelessly or recklessly engaged the services of labour hire provider that is not complying with the conditions of their license; or
- knows or ought to know that the operator is breaching workplace laws; or
- has aided, abetted, counselled or procured a breach of license requirements or a condition of the license; or
- has been in any way, by act or omission, directly or indirectly, been concerned in or party to the contravention

they should be liable for the payment of all entitlements payable to employees of the provider, to the extent that those liabilities arose from work performed at the host employers workplace/s.

Contravention of the licensing scheme should attract civil penalties, and in serious breaches, criminal penalties.

Question:

10. Do you think it would assist the workers, host employers and labour hire operators if there was access to information and referral services by way of a one stop shop?

The licensing body/compliance unit should create a comprehensive online portal – or ‘one stop shop’ – that serves as an accessible dissemination point for the materials created in line with their educative function.

The portal can be used by license holders to upload their reporting information and to easily update information.

¹² Submissions of Professor Peter Whyte to the Victorian Labour Hire Inquiry, University of Liverpool, p.3.

The portal would also function as an easy directory of licensed labour hire companies which businesses and the general public can access, allowing employers to manage their supply chain risks and makes it easier to engage workers with peace of mind.

In addition to creating an online portal, the licensing body should also manage a 'confidential reporting line' which allows people to report breaches, or suspected breaches, of the license by a license holder.